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BRIEF OF PLAINTIFF IN ERROR.

Filed Mar. 29, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

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E. M. CALDWELL, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA AND THE CITY OF GREENSBORO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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STATEMENT OF FACTS.

The defendant, who was an employee of the Chicago Portrait Company, a foreign corporation of Chicago, Illinois, came to Greensboro for the purpose of delivering certain pictures and frames for which contracts of sale (said pictures and frames being in Chicago when said contracts were negotiated) had previously been made by other employees of the Chicago Portrait Company, who had preceded the defendant to Greensboro. The defendant went to the Southern Railway freight station and took therefrom large packages of pictures and frames which had been shipped to Greensboro, N. C., for the purpose of delivery to different parties in Greensboro, who had made the contracts aforesaid with employees of the Chicago Portrait Company. The packages containing the frames and pictures were addressed to the Chicago Portrait Company. They were taken to the rooms of the defendant in a hotel in Greensboro and opened, the pictures placed in their proper frames and delivered one at a time to the purchasers in Greensboro. The defendant had been engaged in the work two days when arrested. Defendant sold no picture frames, pictures, photographs or likenesses of the human face and delivered none except to the purchasers in Greensboro who had negotiated for them with other employees of the Chicago Portrait Company who had preceded the defendant to Greensboro. Defendant was arrested and adjudged guilty of violating the ordinance of the City of Greensboro set out in the record.

ASSIGNMENTS OF ERROR.

Defendant assigned as grounds of error:

1. The facts set out in the special verdict do not make defendant guilty of engaging in the business of delivering pictures without first having obtained a license so to do—within the purview and contemplation of the ordinance of the City of Greensboro.

2. That should defendant be held liable under the ordinance in controversy said ordinance is unconstitutional, being in conflict with Article I, Section 8, of the Constitution of the United States, being an interference with and an attempt to regulate commerce among the States and a burden upon the same.

ARGUMENT.

It is immaterial that the Chicago Portrait Company is a corporation. Whilst it is true that a foreign corporation is not a citizen of another State and can claim no privilege or protection under Article IV., Section 2, of the Constitution of the United States, yet it is now firmly settled that inter-State commerce by a corpor-

ation is entitled to the same protection as when carried on by individuals.

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196.
Crutchen vs. Kentucky, 141 U. S., 47.

"No State has the right to levy a tax on inter-State commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation or on the occupation or business of carrying it on for the reason that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress."

It follows, of course, that as a State cannot levy such a tax a municipal corporation, a creature and agency of the State, cannot do so.

Lyng vs. Michigan, 135 U. S., 165.
Leloup vs. Port of Mobile, 127 U. S., 640.
Gibbons vs. Ogden, 9 Wheaton, 1.
State Freight Tax Cases, 15 Wallace, 232-279.
Robbins vs. Shelby Taxing District, 120 U. S., 480.
Brennan vs. Titusville, 153 U. S., 289-303.
Stoutenburg vs. Hennick, 129 U. S., 141-148.
Asher vs. Texas, 128 U. S., 129.
Freight Discrimination Cases, 95 N. C., 428-434.
State vs. French, 109 N. C., 722.
Adkins vs. City of Richmond, 47 L. R. A., 583.

Machine Co. vs. Gage, 100 U. S., 676; Emert vs. Missouri, 156 U. S., 296; State vs. French, 109 N. C., 722; Range Co. vs. Carver, 118 N. C., 328; Hopkins vs. United States, 171 U. S., 578; May vs. New Orleans, 178 U. S., 496; Austin vs. State of Tennessee, 179 U. S., 132; are no departure, as thought by some, from the rule of decisions so firmly established by the Supreme Court of the United States.

Machine Co. vs. Gage was an action brought by the Howe Sewing Machine Company, a Connecticut corporation, which had shipped its machines to Nashville, Tennessee, and from there an agent went to Sumner County to peddle and sell these machines. That was purely "Intra-State" Commerce. The fact that the trade or occupation of peddling the machines was exercised in Tennessee after the situs was changed from Connecticut to Tennessee and the machines became intermingled with the general mass of property of the latter State takes away entirely the "Inter-State Commerce" feature.

The decision in Machine Co. vs. Gage, as to a peddler carrying with him for sale goods already in the State, was recognized and distinguished by Mr. Justice Bradley in delivering the opinion in

Robins vs. Shelby Taxing District, from the case then before the Court of a drummer selling or soliciting orders for goods which were at the time in another State.

In Emert vs. Missouri "The defendant's occupation was offering for sale and selling sewing machines by going from place to place in the State of Missouri in a wagon without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods or of any order for their transfer from one State to another and were neither inter-State commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic, and so far as appears the only goods in which he was dealing had become part of the mass of property within the State."

The above quotation is taken from the opinion of Mr. Justice Gray in Emert vs. Missouri.

Range Co. vs. Carver, 118 N. C., 328, involved the constitutionality of a tax on peddlers imposed by Sec. 28, Chapter 116, Public Laws of 1895. The section reads as follows:

"On every itinerant person or company peddling clocks, stoves or ranges one hundred dollars annually on each wagon, 'if wagons are used,' in each county where he or they may peddle. If wagons are not used the tax shall be paid on each agent."

Peddlers going from county to county selling clocks, stoves, or ranges already in the State, as is evidently contemplated by the statute, do an "intra-State" and not an inter-State business, it matters not where the article so peddled and sold came from originally. This case is identical with Machine Co. vs. Gage. Mr. Justice Furches, in delivering the opinion of the Court, says:

"The case of Machine Co. vs. Gage was almost our case. If there is any distinction in the principle there decided and the case now before us we have been unable to discover it after a careful examination."

In State vs. French, Mr. Justice Clarke, who delivered the opinion of the Court, says:

"Under the decisions of the Supreme Court of the United States, if the 'business,' the carrying on of which is made liable to the tax, was that of inter-State commerce, such as offering for sale or selling goods in one State to be shipped to the buyer, who is in another State, such tax would be inhibited. The tax is not on any dealings between the parties outside of the State and the defendants within the State, nor on the transportation of goods into the State. The business taxed and intended to be taxed is that of buying and selling goods, wares and merchandise, that is, carrying on a mercantile tax in this State."

In State vs. French, defendants purchased goods in other States,

brought them into this State and *sold* them here, but made no purchase within the State. Such commerce was clearly "intra-State." It was carried on in this State between the defendants and other parties in the State. *The inter-State dealings were terminated when the goods were delivered at the store of the defendants.* The business subsequently carried on of vending and disposing of them is "intra-State" traffic upon which the State can levy its license tax.

The case of Hopkins vs United States, 171 U. S., 578, is relied upon by some as an authority in conflict with Lyng vs. Michigan, Robbins vs. Shelby Taxing District, Brennan vs. Titusville and the line of cases cited in this brief. But an analysis will show no conflict. In Hopkins vs. the United States the relief sought was based on an act of Congress entitled, "An Act to protect trade and commerce against unlawful restraints and monoplies," and the bill was filed against certain residents of the State of Kansas who were members of a voluntary un-incorporated association known and designated as the Kansas City Live Stock Exchange. It was alleged that the members of the Exchange had adopted for their government certain articles of association rules and by-laws, which were in restraint of trade and commerce between the States It was held otherwise, but it will be seen running through the opinion of the Court that stress was laid upon the fact that the business of the members was wholly concerned with buying and selling live stock after their arrival at Kansas City, and that the distinction made in the cases heretofore cited between the sale and offer to sell in one State property which is situated in another State and the sale of property after it has been brought into the State in which the sale is negotiated was kept steadily in view—the one being inter-State commerce and subject only to the regulation of Congress, and the other being domestic and subject to legislation by the State.

In F. May & Co., plaintiffs in error, vs. The City of New Orleans, Mr. Justice Harlan in delivering the opinion of the Court said: "We have seen that the plaintiffs in effect contend that having paid the duties imposed by the United States they were entitled without liability to taxation upon the goods as property to open the boxes in which the separate parcels of goods were transported and put such separate parcels in the hands of agents to be sold wherever in the State or the country customers could be found. The separate parcels—such is the effect of the argument—are not to be deemed incorporated into the mass of the property of the State while thus being carried around the country by the importer's agent—no separate parcel, so long as it remained in the particular form in which it was packed in a box or case with other parcels, ceasing to have the character of an import until after it was sold by such agent. This proposition cannot be sustained. We cannot doubt that the goods when placed in the hands of agents for

sale in separate parcels have been so acted upon by the importer that they have ceased to be imports and have become part of the mass of the property of the State liable to local taxation. But, what is the difference in principle between the case of sales by an importer through a traveling agent and the case of an importer who opens the box or case in which his goods, wrapped in separate parcels, were imported, and, by employees, sells, or offers to sell, the separate parcels, either from the open box or case in his store or from shelves or counters upon which such parcels have been placed for examination and sale?"

The conclusion of the Court was that the goods imported by C. F. May & Co. "lost their distinctive character as imports and became a part of the general mass of the property of Louisiana and subject to local taxation as other property in the State the moment the boxes, cases, or bales in which they were shipped reached their destination for use or trade, and were opened, and the separate packages therein exposed or offered for sale; consequently, the assessment in question was not in violation of the Constitution of the United States.

The facts in the case at bar are entirely different and are clearly and accurately stated in the dissenting opinion of Mr. Justice Clark, in which Chief Jnstice Faircloth concurred. "The orders for the portraits and frames were taken in Greensboro by the traveling agent of a Chicago firm. If the portraits made in Chicago in consequence of such contract had each been sent direct to the person for whom it was made, this would have been inter-State commerce. This feature of the transaction is not changed by the fact that a batch of portraits was sent "knocked down" to Greensboro, the frames and portraits packed separately, and were, by another agent of shipper, who came to Greensboro for that purpose from Chicago, put together, each portrait in its frame. This was simply an economical method of transportation. There is no new contract with the customer. There was no "breaking of bulk" in the legal meaning of the term, for each article, though shipped with others, kept its individuality. Each portrait could be of use only to the person for whom it had been made, and was as distinctly severed from the rest by that fact as if it had been sent in a separate cover. The only contract was that between the Chicago firm's agent, in the first instance, and the customer. The title does not pass until the picture is approved and paid for. This is the same case as Robbins vs. Taxing District, 120 U. S., 480, in which it was held that the business of offering for sale or selling goods to be shipped to the buyer from another State is inter-State commerce. This is not the case of State vs. French, 109 N. C., 722, or State vs. Wessell, 109 N. C., 735, in which the goods were bought in another State, shipped here in bulk, and then by the buyer was sold to his customers. The sale by such buyer to his customers was a North Carolina business and taxable. But here the only "dealing" is

between the Chicago house, through its agent with a customer here, and the shipping of the identical article to an agent in Greensboro, whose sole duty is to complete the delivery upon payment of the purchase money."

William B. Austin, Plaintiff in Error, vs. The State of Tennessee, 179 U. S., 343. In this case it was decided that paper packages of cigarettes, each three inches in length and one and one-half inches in width, containing ten cigarettes, without any shipping address on such packages, when they are taken from a loose pile of such packages at the factory by an express company, in a basket which it furnishes, in which it carries them, and from which it empties them on the counter of a consignee in another State do not constitute original packages of inter-State commerce, but if there is any original package in the shipment it is the basket.

The decisive question in this case was whether each particular parcel of cigarettes was an original package within the constitutional import of those words as defined by the previons adjudications of the courts. This issue was answered in the negative. Mr. Justice White concurred in the majority opinion, "not only from the size of each particular parcel, but from all the other surrounding facts and circumstances, among which may be mentioned the trifling value of each parcel, the absence of an address on each and the fact that many parcels for the purpose of commercial shipment were aggregated, thrown into and carried in an open basket. Thus associated in their shipment they could not under all the facts and circumstances of the case, after arrival, be segregated so as to cause each to become an original package."

This was a very extraordinary case in many respects. There were many facts connected with it which, in the opinion delivered by Mr. Justice Brown, furnished strong evidence of fraud.

In Com. vs. Schollenberger, 156 Pa., 201, 22 L. R. A., 155, 27 Atl., 30, an original package is defined to be "such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce." To the casual observer the method of transportation adopted in this case would seem to have been intended rather for the purpose of unlawful traffic than for convenience in handling and security in transportation of merchandise. And such seemed to be the view of the transaction as expressed in the majority opinion of the Court.

No such facts will be found and no such surroundings in the case at bar. Here there is no such suggestion of fraud in any respect. The method of transportation secured convenience, economy and safety for the merchandise. Each portrait and frame retained its distinctive identity. They could be of use only for the person for whom they had been made and they were as completely severed from the rest by that fact, as if they had been sent in

separate cover. There is no analogy between a box of portraits and frames, each intended for a particular person, and a basket of loose cigarette packages with no address on any package and each without any identity in the general mass.

Inter-State commerce cannot be taxed at all by the State.

It is not a material point in the case that no discrimination is made between domestic persons and citizens of another State "engaged in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the human face in the city of Greensboro," that all are taxed alike. Inter-State commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the State.

Robbins vs. Shelby Taxing District, 120 U. S., 489.
The State Freight Tax, 15 Wallace, 232.

A tax on the occupation of doing a business is a tax on the business.

Leloup vs. Mobile, 127 U. S., 640–645.
Welton vs. Missouri, 91 U. S., 275–278.
Brown vs. Maryland, 12 Wheaton, 419–444.

The tax imposed is not exacted in the exercise of the police, but of the taxing power, and is for revenue purposes.

This will manifestly appear from an examination of Section 57 of the Charter of the City of Greensboro, also Section 21 and the ordinance in question, all of which are set out in the record.

If it be claimed that the ordinance in controversy is a regulation made in the exercise of the police power of the State under that guise it cannot be made a direct burden and obstruction to inter-State commerce.

Brennan vs. Titusville, 153 U. S., 289.
New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650–661.
Henderson vs. Mayor of New York, 92 U. S., 259.
Railroad Co. vs. Husen, 95 U. S., 465.
Walling vs. Michigan, 116 U. S., 446–460.
Minnesota vs. Barbour, 136 U. S., 313.

It surely will not be seriously controverted that contracts for the sale of pictures and frames made by employees of a foreign corporation in Chicago, said pictures and frames being at the time in Chicago, said employees coming to Greensboro for the purpose of

making said sale and said pictures and frames coming to Greensboro afterwards in pursuance of said contract is not inter-State commerce. Every decision, in which the subject is discussed freely, announces this doctrine. Nor can it be said that the delivery of pictures and frames under such contracts for sale by an employee of the same said foreign corporation who came for the purpose of said delivery, and, so far as appears, engaged in the business of delivering no other pictures and frames than those so sold, is not inter-State commerce.

To say that a foreign corporation might make the contracts for sale and not be allowed to deliver to the purchaser would be giving a shadow and denying the substance—would render abortive the provision of the Constitution of the United States which inhibits a State from regulating inter-State commerce. The power of Congress to regulate inter-State commerce cannot be stopped at the external boundary of a State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered.

Gibbons vs. Ogden, 9 Wheaten, 1.
Brown vs. Maryland, 12 Wheaten, 419.
Leisy vs. Hardin, 135 U. S., 100–108.

In State vs. French, 109 N. C., 722, the Court said that "the inter-State dealings were terminated when the goods were delivered at the store of the defendants." The defendants were the purchasers of the goods. In the case before us the inter-State dealings were terminated when the pictures and frames were delivered to the purchasers, and the defendant was engaged in inter-State commerce until that delivery was completed.

It was insisted in the Courts below that the pictures and frames should not have been taken one at a time from the packages in which they came and delivered to the purchasers. That the bulk should not have been broken. How, then, could they have been delivered? Is it less inter-State commerce to deliver one picture than a box of pictures? All were shipped under contracts of sale clearly inter-State commerce. If, when a picture was taken from a package it was sold or taken for the purpose of being sold or offered for sale, then it would have lost its inter-State feature and become a portion of the general mass of the property of the State and intermingled with it; but when taken for delivery, until that delivery was made in pursuance of the contracts of sale it was not a part of the general mass of property upon which the State or a municipality, a creature of the State, had a right to place a burden.

Can a corporation or citizen of another State, making contracts of sale for pictures and frames of an inter-State character, be forced

to the inconvenience and additional expense of shipping them singly and delivering them singly. The position can be maintained neither by reason nor authority.

In re Spain, 47 Federal Reporter, page 208, decided July 8, 1891. In this case two agents of a non-resident firm were arrested presumably while delivering articles of household goods made by said firm and previously ordered by the persons to whom delivery was made. This case is identical with the case at bar in this—that the articles previously ordered were all placed in one or more boxes and consigned to the agents in bulk and were by said agents distributed. It was claimed that when the boxes were broken open for distribution the articles became intermingled with the general mass of the property of the State and were therefore taxable. The Court did not sustain this contention, but said, "It is idle to say that a non-resident may send drummers or persons to solicit sales in a sister State, but that the State may tax them for making delivery of the goods sold. * * * The right to sell implies the obligation and right to deliver."

In re Tyerman, 48 Federal Reporter, page 167, decided November 6, 1891. "The precise question was decided in favor of the petitioner in the case of Spain, 47 Federal Reporter, 208, Judge Bond saying, "The right to sell implies the obligation and the right to deliver. It is as much inter-State commerce to do the one as the other."

State vs. Coop, (S. C., July 15, 1898), 30 S. E. Reporter, page 609. In this case an agent of a non-resident company was arrested while delivering portraits and frames. It was conceded that there was no ground for his arrest for delivering the portraits, but as the agent also delivered frames which had not been specifically ordered, at the same time with the portraits, it was contended that the delivery of such frames and the receipt of the price therefor constituted the agent a peddler and rendered him amendable to the ordinance in question, but the contention was not sustained. The facts, however, in this case are different from the facts in the case at bar, for in the case at bar there was an order for the frames and portraits at the same time.

City of Laurens vs. Elmore, (S. C., July 6, 1899), 33 S. E. Rep., page 560. In this case an agent of a non-resident company was arrested while delivering enlarged photographs with their frames. It was contended that as the frames had not been previously ordered with the photographs he could be arrested for selling the frames. This contention was not sustained. In the dissenting opinion it was conceded that if the frames had been sold and delivered in pursuance of the contract for delivery of enlarged photographs such sale and delivery would have constituted inter-State commerce and would have come under the principles announced in the majority opinion.

Upon the reasoning of the cases which have been cited and in

accordance with the principles enunciated in them the tax imposed by the City of Greensboro upon the defendant was a direct burden upon inter-State commerce and was therefore beyond the power of the city.

CHAS. M. STEDMAN,

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